UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

ROGER A. SEVIGNY, in his official capacity as INSURANCE COMMISSIONER OF THE STATE OF NEW HAMPSHIRE, as LIQUIDATOR OF THE HOME INSURANCE COMPANY, Plaintiff, v. THE UNITED STATES OF AMERICA and ERIC H. HOLDER, JR., in his official capacity as ATTORNEY GENERAL OF THE UNITED STATES, Defendants.	Civil Action No. 13-401-PB

LIQUIDATOR'S MEMORANDUM OF LAW
IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

The plaintiff, Roger A. Sevigny, in his official capacity as Insurance Commissioner of the State of New Hampshire, as Liquidator ("Liquidator") of The Home Insurance Company ("Home"), moves for summary judgment against the defendants the United States of America and Eric H. Holder, Jr., in his official capacity as Attorney General of the United States ("Attorney General" and, collectively, "United States" or "defendants").

In this action, the Liquidator seeks a declaration concerning 31 U.S.C. § 3713 ("Federal Priority Act" or "Priority Act") to allow him to proceed with a 15% interim distribution to creditors of the insolvent Home with allowed Class II (policy level) claims. The United States has asserted Priority Act rights as to unknown claims. As discussed in connection with the United States' motion to dismiss, this threat of personal liability prevents the Liquidator from making an interim distribution of over $150 million that has been approved by the court

supervising the Home liquidation. The Liquidator requests that the Court enter a declaration of rights to remove uncertainty over the application of the Federal Priority Act and permit the Liquidator to make the distribution.[1]

Statement of Undisputed Facts

1. On June 13, 2003, the Superior Court for Merrimack County, New Hampshire ("Supervising Court") declared that Home was insolvent and appointed the Insurance Commissioner of the State of New Hampshire and her successors as its Liquidator. The plaintiff is the present Insurance Commissioner as the Liquidator of Home. Affidavit of Peter A. Bengelsdorf ("Bengelsdorf Aff.") ¶ 2, Ex. 1 (Order of Liquidation).

2. Under the New Hampshire Insurers Rehabilitation and Liquidation Act, N.H. RSA 402-C ("Act"), the Liquidator has exclusive authority, subject to oversight of the Supervising Court, to conduct the liquidation. See RSA 402-C:21, :25. The liquidation proceeding is the proper forum for all claims against Home. See RSA 402-C:57. The Act requires that the Supervising Court fix a deadline for filing of claims, and the deadline for Home was June 13, 2004. See RSA 402-C:37. As a result of the liquidation, many claims under Home's policies are being handled by insurance guaranty associations. See, e.g., N.H. RSA 404-B (establishing the New Hampshire Insurance Guaranty Association). Bengelsdorf Aff. ¶ 3, Ex. 1 ¶ bb.

3. The United States, through the United States Department of Justice ("DOJ"), filed seven proofs of claim with the Liquidator in 2004 and 2005. Bengelsdorf Aff. ¶ 4. Six of the proofs of claim asserted known claims against Home. Id. ¶¶ 5-7, Exs. 2-7. The Liquidator has

[1] The Liquidator originally also sought an order directing the United States to act on his request for a waiver of Federal Priority Act claims to allow the distribution to proceed. In its July 21, 2014 Memorandum and Order (Dkt. #13), the Court dismissed that count of the complaint.

addressed those claims. Id. ¶¶ 6-7.[2] To the extent the claims are allowed at Class II priority, the United States will receive the same percentage distributions from the Home estate as all other allowed Class II claims. Id. ¶ 8. The Liquidator does not anticipate that the assets of Home will be sufficient to make any distribution on claims assigned priorities below Class II. Id.

4. The United States also filed a "protective" proof of claim concerning unknown claims on June 11, 2004. Bengelsdorf Aff. ¶ 9, Ex. 9 (protective proof of claim). The protective proof of claim stated that:

> The United States of America, on behalf of the U.S. Environmental Protection Agency, the U.S. Department of Interior, the National Oceanic and Atmospheric Administration of the Department of Commerce, the Department of Defense, and any other agencies that may have claims, files this protective Proof of Claim as it relates to any claims held by these agencies that are not currently known or are not currently known to relate to the Home Insurance Company. If or when the United States learns of actual claims held by these agencies, the United States will file an Amended Proof of Claim relating to the specific actual claim. The United States reserves the right to supplement this Proof of Claim.

Ex. 9 at 3 (emphasis added). The proof of claim asserts that the Priority Act "provides the United States with certain rights of priority that may be applicable." Id. at 1.

5. The object of an insurer liquidation is to determine claims, collect assets and distribute the assets to those with allowed claims in accordance with the statutory priorities. The New Hampshire Act provides for interim distributions of assets. RSA 402-C:46, I. It also provides for "early access" distributions to guaranty associations that have paid claims under policies issued by the insolvent insurer. RSA 402-C:29, III. Unlike general distributions, early

[2] Five of the claims are "third party" claims based on United States' claims against companies insured by Home that the United States has asserted directly in the Home liquidation pursuant to N.H. RSA 402-C:40, I. Bengelsdorf Aff. ¶ 7. One claim of these Class II claims was allowed in an agreed amount, one was denied, one was withdrawn. Id. ¶¶ 7(b), (c), (d). Another will be withdrawn when the United States receives a payment from a guaranty association. Id. ¶ 7(a). The last third party claim sets forth no present claim as amounts due the United States are being paid by others, so the matter has been deferred. Id. ¶ 7(e). The sixth claim was for Longshore and Harbor Workers Compensation Act assessments and has been assigned to Class III. Id. ¶ 6. See Solis v. Home Ins. Co., 848 F.Supp.2d 91 (D. N.H. 2012).

access distributions are subject to statutorily-required "claw back" agreements under which guaranty associations will return distributions if necessary to pay claims of the same or higher priority. Id. The guaranty associations that have received early access distributions have all entered such "claw back" agreements with the Liquidator. Bengelsdorf Aff. ¶ 10.

6. The Liquidator has made nine early access distributions to guaranty associations. Bengelsdorf Aff. ¶ 11. At the Liquidator's request, the Supervising Court's orders approving the first six early access distributions provided that they were subject to receipt of a waiver of Federal Priority Act claims from the United States. Id.; see, e.g., Ex. 10. The Liquidator requested limited releases of claims under the Priority Act from the United States with respect to the first six distributions. Bengelsdorf Aff. ¶ 12. The United States entered six substantially identical release agreements with the Liquidator "[i]n order to permit a distribution of the assets of the estate." Id.; see, e.g., Ex. 11 at 1 (May 2010 Release Agreement regarding the sixth early access distribution). The United States was not willing to provide waivers for later early access distributions. Bengelsdorf Aff. ¶ 13. In light of the statutory claw back agreements with the guaranty associations, the Liquidator sought approval to make the seventh through ninth early access distributions without a waiver from the United States. Id.

7. In February 2012, the Liquidator moved for approval of an interim 15% distribution to all creditors with allowed Class II (policy level) claims. Bengelsdorf Aff. ¶ 14, Ex. 12 (Liquidator's Motion for Approval of Interim Distribution). As stated in the Liquidator's motion, the distribution needed to account for all Class II obligations of Home, including those not yet determined, in order to comply with New Hampshire law and assure equal treatment for all Class II claimants. The Liquidator engaged an internationally-known actuarial consulting firm to estimate Home's unpaid policy-related obligations, including both selected and 95%

confidence level estimates. As in the case of financial statements of solvent insurers, the actuarial estimates include estimates of liability for known claims and also for claims that are not presently known ("incurred but not reported" or "IBNR" claims).[3] The Liquidator's approach thus protected the interests of those with potential but unknown Class II claims, including the United States. Bengelsdorf Aff. ¶ 14.

8. The Liquidator proposed a 15% interim distribution, which reflected the then-available assets ($1.382 billion) less the projected expenses of the liquidation ($324 million) divided by the estimated Class II liabilities at the 95% confidence level ($6.584 billion). See Ex. 12. The proposed distribution percentage left substantial assets available for later distributions. Based on claims and assets as of December 31, 2011, the 15% distribution would involve $194.1 million ($152.7 million in cash and $41.1 million in early access distributions that would no longer be subject to claw back), leaving approximately $962 million in available assets.[4] This is reasonable and prudent as the Liquidator's calculation used the 95% confidence level estimate of ultimate Class II liabilities and excluded from consideration future assets, including reinsurance recoveries and investment income. Bengelsdorf Aff. ¶ 15.

9. The Supervising Court approved that interim distribution on March 13, 2012. Bengelsdorf Aff. ¶ 16, Exs. 13 and 14 (the Approval Order and subsequent order modifying the Approval Order). In light of the position of the United States regarding the Federal Priority Act, the Approval Order provided that the interim distribution is subject to receipt of a waiver from the United States of federal priority claims under the Priority Act. Id., Ex. 13.

[3] See Stephens v. Nat'l Distillers & Chem. Corp., 6 F.3d 63, 65 (2d Cir. 1993) ("Although they are only estimates, both case reserves and IBNR reserves must be reported as liabilities in the financial records of an insurance company.').

[4] Based on allowed claims and available assets as of June 30, 2014, the initial 15% distribution will involve approximately $283 million ($224 million in cash and $59 million in early access distributions that will no longer be subject to claw back) and leave approximately $1.008 billion in available assets in the Liquidator's control. Bengelsdorf Aff. ¶ 15 n. 1.

10. On April 12, 2012, the Liquidator requested a waiver of federal priority claims from the DOJ to permit the interim distribution. Bengelsdorf Aff. ¶ 17, Ex. 15. To date, the United States has neither granted nor denied that request. Id.

11. In the course of this litigation, the United States advised that the United States Environmental Protection Agency ("EPA") has compared the list provided by the Liquidator of the approximately 260,000 persons given notice of the Home liquidation with the EPA's "list of Superfund sites located throughout the nation and all potentially responsible parties at each of these sites." United States Memorandum in Support of Motion to Dismiss ("US Mem."; Dkt. # 8 beginning at 3) at 4 n. 3 (also included as Bengelsdorf Aff. Ex. 16). This matching exercise "generated a list of 7,000 possible claims against policyholders as potentially responsible parties at Superfund sites." Id. (emphasis added). The United States added that "[t]he EPA has been working diligently to refine this list of 7,000 potential claims," and that "[t]he United States has kept the Liquidator apprised of specific claims as they are identified and will continue to do so." Id. (emphasis added).

12. On April 23, 2014, the United States provided the Liquidator with the EPA list of 7,000 "potential claims" or "possible claims." Bengelsdorf Aff. ¶ 19, Ex. 17. The list identified companies that had been given notice of the Home liquidation and that the EPA had listed as potentially responsible persons at various Superfund sites. Ex. 17. On May 7, 2014, the Liquidator requested that the United States advise whether it asserts rights under the Federal Priority Act concerning the EPA list. Bengelsdorf Aff. ¶ 20, Ex. 18 at 6. Although it replied to the Liquidator's letter on May 27, 2014, the United States did not respond to the Liquidator's request. Id.

13. The United States has not filed any proofs of claim or amendments to the protective proof of claim since 2005. Bengelsdorf Aff. ¶ 21. Except for the six proofs of claim identifying known claims (Exhibits 2-7), the United States has not asserted any claims against Home or the Liquidator. Id.

14. In light of the United States' assertion of Federal Priority Act rights in the protective proof of claim, its unwillingness to grant waivers for later early access distributions after granting waivers for six prior early distributions, its unwillingness to act on the current waiver request, its references to "7,000 possible claims" in the US memorandum, its submission of the EPA list, and its failure to respond to the Liquidator's question whether the United States' views the possible claims on the EPA list as "claims" under the Priority Act, the Liquidator fears that the United States may bring an action to enforce personal liability under the Federal Priority Act if he makes the interim distribution. The Liquidator accordingly has not made the 15% interim distribution approved by the Supervising Court in 2012. Id. ¶ 22.

The Statutory Schemes

1. The New Hampshire Insurers Rehabilitation and Liquidation Act

Under the New Hampshire Act, N.H. RSA 402-C, a liquidator has exclusive authority, subject to oversight of the supervising court, to conduct the liquidation of an insolvent insurance company. See RSA 402-C:21, :25.

The liquidation proceeding is the proper forum for all claims against the insolvent insurer. See RSA 402-C:57. The Act requires that the supervising court fix a deadline for filing of claims against the insolvent insurer. See RSA 402-C:37. The liquidator is to give notice of the liquidation and deadline to potential claimants. See RSA 402-C:26. Claimants are required to file proofs of claim consisting of a "verified statement" that includes "[t]he particulars of the

claim," "[t]hat the sum claimed is justly owing," and – in the case of third party claims – "a conditional release of the insured." See RSA 402-C:38. The liquidator is charged with determining claims and filing reports of claims and recommendations with the supervising court. See RSA 402-C:41, :45. The liquidator is also charged with marshaling the assets of the insolvent insurer. See RSA 402-C:21, I, :25, VI, XII, XIII.

The Act specifies the order in which the assets are to be distributed to claimants with allowed claims. RSA 402-C:44. The Act divides claims into ten successive priority classes, each of which may receive a distribution only after all creditors in prior classes have been paid in full or adequate funds retained for payment. The first five classes are: (I) administration costs; (II) claims under insurance policies, including claims of insurance guaranty associations; (III) claims of the federal government other than those in higher priority classes; (IV) wages; and (V) residual claims, including claims of state or local governments. RSA 402-C:44, I-V.

The Act provides for interim distributions to creditors in a manner that protects those with undetermined claims:

> Under the direction of the court, the liquidator shall pay dividends in a manner that will assure the proper recognition of priorities and a reasonable balance between the expeditious completion of the liquidation and the protection of unliquidated and undetermined claims, including third party claims.

RSA 402-C:46, I (emphasis added). The Act also provides for "early access" distributions to guaranty associations that are paying claims under policies issued by the insolvent insurer. RSA 402-C:29, III. Unlike general distributions, early access distributions are subject to "claw back" agreements under which guaranty associations will return distributions if necessary to pay claims of the same or higher priority. RSA 402-C:29, III(b)(4).

2. The Federal Priority Act

The Federal Priority Act invoked by the United States has two parts. The "priority" section provides priority for federal claims by requiring that a "claim" of the United States government "shall be paid first" by an insolvent debtor. It states:

> A claim of the United States Government shall be paid first when –
> (A) a person indebted to the Government is insolvent and – . . .
> (iii) an act of bankruptcy is committed; . . . .

31 U.S.C. § 3713(a)(1). This priority applies in all actions other than those under title 11 – the Bankruptcy Code. 31 U.S.C. § 3713(a)(2).

The "representative liability" section enforces the priority section by making a representative of an estate who pays a non-federal debt before paying a federal claim personally liable for the amount not paid to the United States. The representative liability section provides:

> A representative of a person or an estate (except a trustee acting under title 11) paying any part of a debt of the person or estate before paying a claim of the Government is liable to the extent of the payment for unpaid claims of the Government.

31 U.S.C. § 3713(b).

For purposes of the Priority Act, the term "claim" is defined as follows:

> [T]he term "claim" or "debt" means any amount of funds or property that has been determined by an appropriate official of the Federal Government to be owed to the United States by a person, organization, or entity other than another Federal agency.

31 U.S.C. § 3701(b)(1).[5]

[5] Section 3701(b)(1) provides in full:

> In subchapter II of this chapter [31 U.S.C. §§ 3711-3720E] and subsection (a)(8) of this section, the term "claim" or "debt" means any amount of funds or property that has been determined by an appropriate official of the Federal Government to be owed to the United States by a person, organization, or entity other than another Federal agency. A claim includes, without limitation –
>
> (A) funds owed on account of loans made, insured, or guaranteed by the Government, including any deficiency or any difference between the price obtained by the Government in the sale of a property and the amount owed to the Government on a mortgage on the property,
> (B) expenditures of nonappropriated funds, including actual and administrative costs related to shoplifting, theft detection, and theft prevention,

3. Application of the Federal Priority Act in State Insurer Liquidations

Liquidators of insolvent insurers have previously litigated with the United States concerning the application of the Federal Priority Act. As a result, it is established that the McCarran-Ferguson Act, 15 U.S.C. § 1012, protects state insurer liquidation priority statutes from preemption to the extent they serve to protect policyholders. United States Dep't. of Treasury v. Fabe, 508 U.S. 491, 493, 508-09 (1993); Ruthardt v. United States, 303 F.3d 375, 381-84 (1st Cir. 2002), cert. denied, 538 U.S. 1031 (2003). The policy-level claims afforded priority under the Act, RSA 402-C:44, II, thus have priority over non-policy claims of the United States assigned lower priority by RSA 402-C:44, III, notwithstanding the Federal Priority Act. See Fabe, 508 U.S. at 493. Federal policy-level claims will share in the Class II priority with all other Class II claims, including those of insurance guaranty associations. See Ruthardt, 303 F.3d at 381-84.

It is also established in this circuit that liquidation filing deadlines do not apply to the United States. See Ruthardt, 303 F.3d at 384-86; Garcia v. Island Program Designer, Inc., 4 F.3d 57, 62 (1st Cir. 1993) (Breyer, C.J.). Unlike in bankruptcy, where the United States is required to file its claims by certain deadlines, the United States has "an open-ended exemption from deadlines" in the context of insurer insolvencies. Ruthardt, 303 F.3d at 385 (describing this as "simply terrible public policy"). The United States thus may file claims in the Home liquidation regardless of state filing deadlines, and – if the Court does not enter the requested declarations – the United States may assert that the Liquidator is personally liable if "late-filed" federal policy-

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(C) over-payments, including payments disallowed by audits performed by the Inspector General of the agency administering the program,
(D) any amount the United States is authorized by Act to collect for the benefit of any person,
(E) the unpaid share of any non-Federal partner in a program involving a Federal payment and a matching, or cost-sharing, payment by the non-Federal partner,
(F) any fines or penalties assessed by an agency; and
(G) other amounts of money or property owed to the Government.

level claims cannot be paid the Class II distribution percentage because assets were previously distributed to other policy-level creditors.

STANDARD ON MOTION FOR SUMMARY JUDGMENT

The Court should grant summary judgment if the movant shows that "there is no genuine dispute as to any material fact" and that he is "entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). See Doran v. Contoocook Valley School Dist., 616 F.Supp.2d 184, 190 (D. N.H. 2009).

ARGUMENT

The New Hampshire Insurance Commissioner as Liquidator of Home seeks a declaration of non-liability under the Federal Priority Act so that he may proceed with the initial distribution to claimants from the Home estate. The Liquidator has received approval from the Supervising Court to pay an interim distribution of 15% on allowed Class II (policy level) claims, subject to receipt of a waiver of United States claims under the Federal Priority Act. The Liquidator requested a waiver concerning the 15% interim distribution from the DOJ in April 2012, but no waiver – and no decision – has been forthcoming. The Liquidator has already addressed the known federal claims asserted in the United States' proofs of claim. However, the United States has also asserted Priority Act rights for "unknown" claims in the "protective" proof of claim, and it has now provided the Liquidator with the EPA list of "7,000 possible claims." Accordingly, the Liquidator seeks declaratory relief to ensure that he will not be faced with personal liability under the Priority Act for making the interim distribution.

To be personally liable under the Priority Act, a representative of an estate must have paid other claims such that the estate cannot pay claims of the United States. The known claims that the United States has asserted in its proofs of claim are not of concern because the United

States will receive the amounts to which it is entitled. To the extent its claims have been allowed and assigned to Class II, the United States will receive the same percentage distributions from the Home estate as all other allowed Class II claims. The United States has no greater rights under the Federal Priority Act. To the extent the United States' claims have been withdrawn, denied, or assigned Class III priority, the United States has no Federal Priority Act rights for them. The known claims thus do not trigger potential personal liability under 31 U.S.C. § 3713.

This case concerns the disputed consequences of the United States' unknown claims. In the Liquidator's view, the United States' assertion of unknown claims does not support potential personal liability under the Priority Act for making the interim distribution even if the United States were to subsequently identify and file known claims that could not receive an equivalent distribution. For a representative to be personally liable under the Priority Act, the United States must have a "claim" as defined in 31 U.S.C. § 3701 against the insolvent estate at the time the representative distributes assets. The unknown or potential claims of the United States are not "claims" that could trigger potential personal liability under the Priority Act for making the interim distribution. For a matter to be a "claim" within the statutory definition, it must have been identified as such by a federal official and asserted against Home. The assertion of unknown or potential claims does not place the Liquidator on notice of "claims" to support personal liability for making the distribution. The Court should accordingly declare that the Liquidator may make the 15% interim distribution to claimants with allowed Class II claims without incurring personal liability to the United States.[6]

[6] The Liquidator is not disregarding the possibility of future claims. The Liquidator has taken unknown claims, including unknown claims of the United States, into account. Such claims are provided for as "IBNR" in the actuarial estimate of unpaid Class II liabilities used to determine the interim distribution percentage. See Bengelsdorf Aff. ¶14. See Stephens, 6 F.3d at 65. Consistent with the requirement of New Hampshire law that interim distributions protect those with undetermined claims, see N.H. RSA 402-C:46, the interim distribution approved by the Supervising Court reserves sufficient assets for an equivalent 15% distribution to presently

THE LIQUIDATOR HAS NO PERSONAL LIABILITY FOR MAKING THE INTERIM DISTRIBUTION BECAUSE THE UNITED STATES HAS NOT ASSERTED "CLAIMS" WITHIN THE FEDERAL PRIORITY ACT.

The Federal Priority Act requires that representatives of insolvent estates pay a "claim" of the United States "first" on pain of personal liability for any amount not paid to the United States because the representative gave another creditor preference. 31 U.S.C. § 3713. See United States v. Moore, 423 U.S. 77, 81 (1975); United States v. Renda, 709 F.3d 472, 480 (5th Cir.), cert. denied, 134 S.Ct. 618 (2013). Thus, for a representative to incur liability under the Priority Act, the United States must have a "claim" against the insolvent estate at the time of the distribution. See id. The protective proof of claim and the EPA list do not assert any "claim" against Home. The possibility of future claims is not a "claim" as that term has been defined in 31 U.S.C. § 3701 since 1996. Even if that definition were not applicable, the proof of claim and EPA list fail to assert a "claim" or "debt" as those previously undefined terms in § 3713 and predecessor statutes have been construed by the courts.

I. The United States Has Not Asserted "Claims" As Defined In 31 U.S.C. § 3701 Because No Federal Official Has Determined Any Amount Of Funds To Be Owed To The United States.

For purposes of the Federal Priority Act, the term "claim" is defined in 31 U.S.C. § 3701(b)(1), which provides in pertinent part:

> In subchapter II of this chapter . . ., the term "claim" or "debt" means any amount of funds or property that has been determined by an appropriate official of the Federal Government to be owed to the United States by a person, organization, or entity other than another Federal agency. . . . [emphasis added]

This definition applies to the Federal Priority Act because 31 U.S.C. § 3713 is part of subchapter II of chapter 37, which encompasses 31 U.S.C. §§ 3711-3720E. See Renda, 709 F.3d at 479 & n. 3. The statutory definition should be applied in accordance with its terms. "It is well

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unknown claims even if the ultimate value of all Class II claims exceeds the actuarial Central Estimate of $4.112 billion and reaches the 95% confidence level value of $6.584 billion. Bengelsdorf Aff. ¶ 15.

established that 'when the statute's language is plain, the sole function of the courts – at least where the disposition required by the text is not absurd – is to enforce it according to its terms.'" Lamie v. U.S. Trustee, 540 U.S. 526, 534 (2004) (quoting Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A., 530 U.S. 1, 6 (2000)). "When a statute includes an explicit definition, [the courts] must follow that definition, even if it varies from that term's ordinary meaning." Stenberg v. Carhart, 530 U.S. 914, 942 (2000). "Where, as here, Congress defines what a particular term 'means,' that definition controls to the exclusion of any meaning that is not explicitly stated in the definition." United States v. Roberson, 459 F.3d 39, 53 (1st Cir. 2006).

The protective proof of claim and the EPA list do not satisfy the definition of "claim" in § 3701 because no federal official has determined "any amount of funds . . . to be owed to the United States." The plain meaning of the statute requires that a federal official has determined that an entity owes money to the United States. This necessarily requires that a federal official has determined that some particular set of facts makes Home liable to the United States and communicated that determination. An obligation cannot exist – funds cannot be owed – except based on specific facts. The protective proof of claim, however, only asserts that there may be claims that are "not currently known or are not currently known to relate to the Home Insurance Company," while the EPA list only refers to "possible" or "potential" claims. In either case, no federal official has determined any amount of funds to be owed to the United States by Home. The most that can be said is that the federal official who signed the protective proof of claim and provided the EPA list thinks that at some time in the future a federal official may determine that Home owes funds to the United States based on some particular but presently unknown or unevaluated facts. Neither the protective proof of claim nor the EPA list reflects a determination

that funds are owed to the United States by Home. Accordingly, they do not trigger potential liability under the Priority Act for making the 15% interim distribution.

The specificity required by the definition of "claim" in § 3701(b) clarifies the matters that representatives of insolvent estates must address under the Federal Priority Act. The definition was added by the Debt Collection Improvement Act of 1996, Pub.L. 104-134, Title III, Ch. 10, § 31001(z)(1)(B), 110 Stat. 1321-378 (April 26, 1996). By requiring that a federal official have determined and asserted that money is owed to the United States based on specific facts, the definition serves the purposes of that Act, which included "ensur[ing] that the public is fully informed of the Federal Government's debt collection policies and that debtors are cognizant of their financial obligations to repay amounts owed to the Federal Government" and "that debtors have all appropriate due process rights, including the ability to verify, challenge and compromise claims." Pub.L. 104-134, Title III, Ch. 10, § 31001(b)(4), (5), 110 Stat. 1321-358. The Liquidator cannot be "cognizant" of obligations concerning federal claims or "verify" those claims unless a federal official has identified and asserted them. The definition's requirements allow representatives such as the Liquidator to readily identify the claims they must resolve or reserve for before making a distribution.

II. The Definition In 31 U.S.C. § 3701 Controls, And Older Cases Looking To Other Definitions For Guidance Have Been Superseded.

The United States may contend that the definition of "claim" in § 3701(b)(1) does not govern because it was added recently, and that the term "claim" should be construed in light of earlier cases construing that term or the phrase "debt due" used in certain predecessor statutes. Section 3713 was enacted in 1982 as part of the codification of Title 31, United States Code, concerning Money and Finance. Pub.L. 97-258, § 1, 96 Stat. 877, 972 (Sept. 13, 1982). It was a revision of earlier priority statutes dating back to the 1790's. See United States v. Estate of

Romani, 523 U.S. 517, 524 & n. 8 (1998); Moore, 423 U.S. at 80-81. Prior to 1996, there was no statutory definition of "claim" that applied to § 3713. As noted above, the definition in § 3701(b)(1) was enacted as part of the Debt Collection Improvement Act of 1996, Pub.L. 104-134, Title III, § 31001(z)(1)(B), 110 Stat. 1321-378.[7]

In the absence of a definition applicable to earlier versions of the Priority Act, the courts had considered definitions of "claim" or the related term "debt" in various Bankruptcy Acts. E.g., Moore, 423 U.S. at 84-85 (discussing definitions from several Bankruptcy Acts); United States v. Moriarty, 8 F.3d 329, 334 (6th Cir. 1993) (discussing definition in Bankruptcy Code). However, such earlier cases are not controlling in light of the express definition in § 3701.[8] Where Congress has enacted a specific statutory definition for purposes of subchapter II (the statutes concerning "Claims of the United States Government," including § 3713), that definition supersedes earlier constructions. "[A]ltering statutory definitions, or adding new definitions of terms previously undefined, is a common way of amending statutes." Jones v. R.R. Donnelley & Sons Co., 541 U.S. 369, 381 (2004) (quoting Rivers v. Roadway Express, Inc., 511 U.S. 298, 308 (1994)). "An amendment to an existing statute is no less an 'Act of Congress' than a new, stand-alone statute." Id. The definition of "claim" in § 3701(b) thus "controls to the exclusion of any meaning that is not explicitly stated in the definition and regardless of the ordinary

[7] An earlier version of § 3701(b) was added in 1983. However, it did not define the term "claim" but only specified that "[i]n subchapter II of this chapter, 'claim' includes amounts owing on account of loans insured or guaranteed by the Government and other amounts due the Government." 31 U.S.C. § 3701(b), as enacted by Pub.L. 97-452, § 1(13)(A), 96 Stat. 2469 (Jan. 12, 1983) (emphasis added).

[8] The earlier cases may continue to be relevant to the interpretation of § 3713 on other points. The 1982 codification that enacted § 3713 was intended "to restate in comprehensive form, without substantive change, certain general and permanent laws related to money and finance . . . ." H.Rep. No. 97-651 at 1 (1982), reprinted in 3 U.S.C.C.A.N. 97th Cong., 2d Sess. at 1895 (emphasis added). See id. at 3 ("this bill makes no substantive change in the law"), reprinted in 3 U.S.C.C.A.N. at 1897; United States ex rel. Totten v. Bombardier Corp., 380 F.3d 488, 500 (D.C. Cir. 2004). However, the later Debt Collection Improvement Act of 1996 that added the definition of "claim" was not a mere codification. It enacted a debt collection program and made various changes to the administration of federal debt collection efforts. See Conference Report to Accompany H.R. 3019 at 565 (Chapter 10, Debt Collection Improvements) (April 25, 1996), reprinted in 6 Legislative History of the Omnibus Consolidated Rescission and Appropriations Act of 1996 Public Law 104-134 at 565.

meaning of the words." Roberson, 459 F.3d at 53 (citations omitted). See Burgess v. United States, 553 U.S. 124, 129-130 (2008); Stenberg, 530 U.S. at 942.[9]

"The starting point in discerning congressional intent is the existing statutory text, and not the predecessor statutes." Lamie, 540 U.S. at 534 (citations omitted). Where, as here, "the statutory language provides a clear answer, the inquiry ends." Roberson, 459 F.3d at 51. See Hughes Aircraft Co. v. Jacobson, 525 U.S. 432, 438 (1999). The definition requires that a federal official have made a pre-distribution determination that money is owed as a prerequisite to personal liability under the Priority Act. It also presumes that the determination is communicated to the representative. These are minimal requirements that avoid confusion over the application of the Priority Act and prevents *in terrorem* uses of the statute. They have not been met here (except for the six actual claims asserted by specific proofs of claim). The United States may contend that application of the definition could deprive the Government of revenue. However, assertions concerning revenue enhancing purposes of the Federal Priority Act do not override the definition. "[V]ague notions of a statute's 'basic purpose' are nonetheless inadequate to overcome the words of its text regarding the specific issue under consideration." Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 220 (2002) (quoting Mertens v. Hewitt Associates, 508 U.S. 248, 261 (1993)).

III. There Is No "Claim" Even Under the Earlier Cases Because The United States Has Not Identified Any Particular Set Of Facts That Gives Rise To Alleged Liability On The Part Of Home.

Even putting the statutory definition of "claim" aside and looking to the earlier cases, the mere possibility of an obligation being identified in the future is not a "claim" under the Priority

[9] Adding an express statutory definition is a particularly clear example of the general principle that "the meaning of one statute may be affected by other Acts, particularly where Congress has spoken subsequently and more specifically to the topic at hand." Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000) (citing Estate of Romani, 523 U.S. at 530-31).

Act. Where the United States has not asserted an actual set of facts comprising a claim against Home, the Liquidator cannot be liable for making the interim distribution.

The Priority Act's predecessors were enacted "to secure an adequate revenue to sustain the public burthens and discharge the public debts." Moore, 423 U.S. at 81-82 (quoting United States v. State Bank of N.C., 31 U.S. 29, 35 (1832)). There is "no reason for giving [it] a strict and narrow interpretation." Id. (quoting State Bank, 31 U.S. at 35). See also Bramwell v. U.S. Fid. & Guar. Co., 269 U.S. 483, 487 (1926) (statute "ought to be liberally construed"). The courts have accordingly "applied the priority statute to Government claims of all types." Moore, 423 U.S. at 82.

However, the Federal Priority Act's reach is not unlimited. It requires a "claim." It does not encompass liability "in the air" unmoored from specific facts. Not surprisingly, Priority Act cases concern situations where the federal government has asserted that a particular set of facts makes the insolvent entity liable to the United States. The cases presuppose that the United States has an actual claim.

Here, the United States claims priority rights as to matters that it has not identified and asserted, but might identify and assert in the future. The protective proof of claim expressly refers to claims "not currently known" and states that "[i]f or when the United States learns of actual claims held by these agencies, the United States will file an Amended Proof of Claim relating to the specific actual claim." Ex. 9 (emphasis added). The EPA list also only refers to "possible" or "potential" claims that may be determined to exist with respect to the potentially responsible persons and sites on the list. U.S. Mem. at 4 n. 3; see Exs. 16 and 17. This is not sufficient. The possibility that federal agencies may in the future determine that particular factual circumstances give rise to alleged liability on the part of Home is not a "claim" within the

Priority Act. The statute is triggered only when a federal official determines that money is owed to the United States and asserts that claim.

IV. The Moore Factors Weigh Against Finding Federal Priority Act Rights Against The Liquidator Based On Unknown and Unasserted Claims.

In United States v. Moore, the Supreme Court considered three factors in rejecting an effort to read the Federal Priority Act "narrowly": whether anything "on the face of the Act" or any "potential difficulty in administering it" required that result; whether the common law or other Acts shed light on the Act's words; and whether the courts have "regularly applied" the Act to the type of claims at issue there. Moore, 423 U.S. at 83-86. Each of those factors weighs against the United States' contention that "unknown," "potential," or "possible" claims are claims protected by the Federal Priority Act.

First, the language of the Priority Act does not support giving priority to unknown claims, and the common law and bankruptcy statutes are irrelevant. As discussed above, the express statutory definition of "claim" requires that a distinction be drawn between known claims – those that have been determined to exist – and unknown or possible claims. Section 3701(b)(1)'s requirement that a federal official have determined funds to be owed to the United States cannot be satisfied when the actual facts constituting the claim have not been identified.

Given the express definition, the court need not and should not look to common law or bankruptcy acts for guidance. The definition of "claim" in 31 U.S.C. § 3701(b)(1) is tailored to Congress' purposes in the subchapter addressing "claims of the United States government." 31 U.S.C. §§ 3711 et seq. Where Congress intends a particular meaning of the word "claim," it says so. For instance, Congress chose to define the term "claim" in the Bankruptcy Code, see 11 U.S.C. § 101(5), so as to have "the broadest available definition." Federal Communications

Comm'n v. Nextwave Personal Communications, Inc., 537 U.S. 293, 302 (2003) (quoting Johnson v. Home State Bank, 501 U.S. 78, 83 (1991)). In that context, "claim" means a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." 11 U.S.C. § 101(5)(A).[10] By contrast, Congress chose to define the term "claim" in the Comprehensive Environmental, Response, Compensation and Liability Act narrowly as "a demand in writing for a sum certain." 42 U.S.C. § 9601(4).[11] Congress also chose a specific, limited definition for purposes of the Federal Priority Act in 31 U.S.C. § 3701(b).

Second, and most significantly, any application of the Priority Act to unknown and unasserted claims presents grave difficulties in administration. In Moore, the Supreme Court concluded that the proposed interpretation would not "unduly delay distribution of the debtor's estate." 423 U.S. at 83. By contrast, the United States' position that it has priority rights for unknown claims manifestly causes undue delay. As a practical matter, it means that distributions from the insolvent insurer's estate must wait until the United States has completed its review of all potential claims, however long that may take. Indeed, given the possibility of as-yet-undiscovered contaminated environmental sites, it may never be possible to say with certainty that the United States has no more potential claims.

The United States' position is administratively unworkable because representatives of insolvent estates cannot act to comply with the Federal Priority Act and protect themselves from

[10] That broad definition serves to ensure that "all legal obligations of the debtor . . . will be able to be dealt with in the bankruptcy case." Pennsylvania Dept. of Public Welfare v. Davenport, 495 U.S. 552, 558 (1990) (quoting H.R.Rep. No. 95-595 at 309 (1977), U.S. Code Cong. & Admin. News 1978 at 6266). Accord, S.Rep. No. 95-989 at 22 (1978), U.S. Code Cong. & Admin. News 1978 at 5808. See also Ohio v. Kovacs, 469 U.S. 274, 278-82 (1985); Rederford v. U.S. Airways, Inc., 589 F.3d 30, 35 (1st Cir. 2009) ("It defines what interests must be asserted in the Bankruptcy Court, and it defines what is discharged by the proceeding.").

[11] That definition requires parties seeking reimbursement from the federal Superfund to quantify their claim. See Dedham Water Co. v. Cumberland Farms Diary, Inc., 805 F.2d 1074, 1078-1080 (1st Cir. 1986); United States v. Mottolo, 605 F. Supp. 898, 904 (D. N.H. 1985).

personal liability if the claims they need to address are unknown and have not been asserted.[12] The resulting uncertainty necessarily delays distributions while representatives wait for the United States to identify and assert claims. The United States, however, has no incentive to perform any investigation to determine if it has actual claims to assert because it is not subject to any deadlines. This is an absurd result that frustrates the purpose of state insurer liquidations and other insolvency proceedings to distribute assets promptly. See Ruthardt, 303 F.3d at 385 (noting that the exemption of the United States from liquidation filing deadlines is "simply terrible public policy").

The consequences are demonstrated by this case. Home was placed in liquidation in 2003, and the United States filed initial proofs of claim in 2003 and 2004. In March 2012, the Liquidator obtained approval to make the initial interim distribution, and he promptly requested a waiver of asserted Priority Act rights from the United States in April 2012. More than two years later – and more than ten years after it was notified of the Home liquidation – the United States has not taken a position on that request. Instead, the EPA and other agencies are purportedly conducting reviews that are projected to take until at least December 2014. U.S. Mem. at 4 n. 3. Even assuming favorable action at that time, the approved distribution of over $150 million from Home's estate will have been delayed for almost three years because of the United States' assertion of priority rights for unknown claims. However, it does not appear that the EPA has made any progress on its review, and the delay in the distribution thus appears likely to extend into the indefinite future.

[12] The Liquidator has taken into account the interests of those with unknown claims, including the United States. He has complied with the requirement of N.H. RSA 402-C:46 that interim distributions protect the interests of those with undetermined claims by retaining actuaries to estimate Home's ultimate Class II liabilities and calculating the interim distribution percentage based on the actuaries' estimate of ultimate Class II liabilities, including IBNR liabilities, at the 95% confidence level. See Bengelsdorf Aff. ¶¶ 14-15, Ex. 12. Although the United States has offered no explanation, it apparently does not consider this meaningful.

The § 3701(b) definition addresses these issues and results in a workable scheme. By requiring a federal government official to make a determination that funds are owed, Congress has provided for an identifiable universe of claims that a representative must address on pain of personal liability. A representative can address the circumstances where a federal official has made such a determination by resolving or reserving amounts for those claims and then move forward with distributions to other creditors without undue delay.

Third, the courts have not "regularly applied" priority rights to unknown and unidentified claims. See Moore, 423 U.S. at 85. To the contrary, the courts have regularly concluded that claims not known to the representative do not support personal liability under the Priority Act. Even though the Federal Priority Act does not contain a knowledge requirement, the courts have long held that there can be personal liability only where a representative has consciously disregarded a federal claim. See, e.g., Renda, 709 F.3d at 480 (requiring "knowledge of the debt owed by the estate to the United States or notice of facts that would lead a reasonably prudent person to inquire as to [its] existence") (quoting United States v. Coppola, 85 F.3d 1015, 1020 (2d Cir. 1996)); In re Gottheiner, 703 F.2d 1136, 1140 (9th Cir. 1983) ("One of the elements of a violation of federal priority laws is that the individual . . . knew of the corporation's debt to the United States at the time."); Want v. Commissioner of Internal Revenue, 280 F.2d 777, 783 (2d Cir. 1960) (Friendly, J) ("[I]t has long been held that a fiduciary is liable only if it had notice of the claim of the United States before making the distribution."); United States v. Mountzoures, 376 F.Supp.2d 13, 19 (D. Mass. 2005) ("Without notice of the [United States'] claim, Mountzoures cannot be held liable under the federal priority statute."). As one court said when the United States sought to impose personal liability on a representative for a claim it first asserted after the estate was closed, the phrase "'debts due to the United States' . . . is properly

interpreted to mean only those debts concerning which the Government has asserted a claim before the distribution is made." United States v. Vibradamp Corp., 257 F. Supp. 931, 936 (S.D. Cal. 1966).[13]

The distinction between known, asserted claims and unknown, possible or potential claims makes sense. It is reasonable to expect a representative of an insolvent estate to resolve or reserve amounts for known United States claims before making a distribution. The representative can address the asserted claims and thus avoid potential personal liability. The Liquidator has acted on the known claims here. See Bengelsdorf Aff. ¶¶ 6-7. A representative, however, does not have the ability to address unknown claims, so it is unreasonable to impose personal liability for such "claims." Otherwise, the representative can only delay distributions, to the detriment of creditors generally.

"The Priority Act was designed to induce a debtor and its representatives to pay the debts of the government first or, at a minimum, to preserve a debtor's assets pending resolution of any dispute regarding the government's claim." Renda, 709 F.3d at 483. It has achieved that result here, as the Liquidator has addressed the actual federal claims that have been asserted.[14] The Priority Act was not intended to require a representative such as the Liquidator to hold the insolvent's assets for years waiting for the United States to identify and assert claims. The

[13] The Supreme Court has implicitly recognized the knowledge requirement. See King v. United States, 379 U.S. 329, 339 & n. 10 (1964) ("As president of the debtor corporation he must have been aware of the Government's potential claim; most likely he took an active role in the formulation of the plan of arrangement which appended a reference to the Picatinny [government] contracts. . . . In all likelihood, he was present at the time when the possibility of the government claim arose and Mr. Freeman, the company's counsel, made the representation that $94,000 was available to meet it."); id. at 340-41 (White, J, concurring); Field v. United States, 34 U.S. 182, 201 (1835) (Marshall, C.J.) ("If at the time of the confirmation of this tableau of distribution, no debts due to the United States had been known to the syndics, and they had, in ignorance thereof, made a distribution of the whole funds among the other creditors; that might have raised a very different question. But in point of fact, it has not been denied that the syndics, long before that period, had notice of the existence of the debts due to the United States; and the present suit was commenced against them in the preceding March.").

[14] The Liquidator will address any additional United States claims if and when the United States files them. Bengelsdorf Aff. ¶ 21.

United States has no rights under the Priority Act for the unknown or potential matters anticipated in the protective proof of claim or the EPA list or otherwise not yet asserted. Such matters are not "claims." The Liquidator accordingly may make the 15% interim distribution without incurring personal liability under the Priority Act.

CONCLUSION

For the reasons set forth above, the Court should grant the Liquidator's motion for summary judgment and enter a judgment declaring that:

1. For a "claim" to support personal liability under the Federal Priority Act, a federal official must have determined that funds are owed to the United States by Home based upon evaluation of specific factual circumstances and advised the Liquidator of that determination before the Liquidator makes a distribution.

2. The unknown, possible, or potential claims asserted by the United States in the protective proof of claim and the EPA list are not "claims" that can form the basis for imposing personal liability on the Liquidator under the Federal Priority Act;

3. The Liquidator may make the 15% interim distribution to claimants with allowed Class II claims without incurring personal liability to the United States.

Respectfully submitted,

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September 9, 2014

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing filing has been served on counsel of record pursuant to the Court's electronic filing system on September 9, 2014.

/s/ Eric A. Smith